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In the Supreme Court of the United States

OCTOBER TERM, 1942.

No. 102 110

In the Matter of
THE ALLIED PRODUCTS COMPANY,
Bankrupt.

HAROLD H. BARNETT,
Successor Trustee in Bankruptcy of
The Allied Products Company,
Petitioner,

vs.

MARYLAND CASUALTY COMPANY,
Respondent.

REPLY BRIEF OF PETITIONER HAROLD H. BARNETT, TRUSTEE.

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TABLE OF CASES.

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Respondent's answering brief emphasizes the novel theory of this case advanced by respondent to avoid the consequences of the rule of this Court in *Benedict v. Ratner,* and the decisions of the Ohio courts. The Ohio courts in the chattel mortgage cases,[1] and this Court in *Benedict v. Ratner*[2] applying the same rule to an assignment of accounts receivable, held that dominion over the subject matter reserved to the mortgagor or assignor destroyed the lien as against creditors.

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[1] *Collins v. Myers* (1847), 16 Ohio 547;
Freeman v. Rawson (1855), 5 O. S. 1;
Harman v. Abbey (1857), 7 O. S. 218;
Enck v. Gerding (1902), 67 O. S. 245.

[2] 268 U. S. 353.

Respondent seeks to evade the salutary effect of this long-established rule by the ingenious device of asserting that, by agreement of the parties, the assignment does not apply to accounts over which the assignor admittedly exercised dominion prior to default, but only to the accounts over which the assignor had not exercised such dominion at the time of default. Briefly stated the legal problem presented by Respondent's brief is this:

Is an assignment of accounts receivable to secure a debt valid as against the assignor's trustee in bankruptcy where the parties expressly agree (a) that the assignment shall become effective only upon the happening of a condition precedent, namely, default, and (b) that upon default the assignment shall apply only to the accounts not heretofore collected by the assignor?

In the case at bar, before default the assignor (Bankrupt) collected and used over 90% of the accounts, as it had the right to do, and the assignee (Respondent) asserted no claim to the uncollected accounts prior to bankruptcy. The Referee held the assignment invalid, but both the District Court and the Court of Appeals held it valid.

In the usual case of an assignment of accounts to secure a debt, the assignment is immediately effective, applies to all of the accounts, but is subject to a *condition subsequent.* It becomes void on the payment of the debt, and this Court has held it is void if the assignor reserves dominion prior to default.

In the *Ratner* case all of the assignor's accounts were assigned, but it was agreed that the assignor should have the right to collect the accounts and use the collections *until the assignee should "require that all accounts collected be applied in payment of his loans."*[3] Mr. Justice Brandeis states there was a "reservation of dominion *inconsistent with the effective disposition of title* * * *

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[3] 268 U. S. 360.

[which rendered] * * * the transaction void,"[4] and "it embodies fraud conclusively because of the reservation of dominion inconsistent with the effective disposition of title and the creation of a lien."[5]

Surely there can be no distinction in principle between an assignment immediately effective, where the assignor is permitted to collect and use the proceeds until default, and an assignment subject to a condition precedent where the assignment does not become effective until default, where the assignor has the right until default to collect and use the collections, and where the assignment applies only to what remains after default.

The practical result is precisely the same. In either case the assignment, if it operates at all, can operate only on what remains at the time of default. While the form of the two assignments may be different, the substance is precisely the same. There is no effective disposition of title, no effective creation of a lien. In either case nothing definite is assigned—neither the assignor, the assignee, creditors, nor anyone else dealing with the assignor, at any time before the assignor is involved in financial difficulties, can tell what, if anything, is assigned.

The invalidity of the arrangement is not avoided by the device of imposing a technical condition precedent, and by agreeing that the assignment applies to only what remains after the condition has happened. A mere change in the phraseology of the assignment cannot change its legal effect.

Paraphrasing the language of Judge Ranney of the Ohio Supreme Court, spoken with reference to a chattel mortgage where power of sale was reserved to the mortgagor: The assignment must be precisely what it purports to be. It must operate as *an absolute surrender* of the property for the security of the assignee. The assignee has a

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[4] 268 U. S. 362.

[5] 268 U. S. 363.

right to secure himself, but he has no right to hold his assignment and at the same time stipulate for advantages to the assignor, to the prejudice of other creditors.[6]

This rule of law is fundamental. Neither respondent nor the courts below have given any valid reason why the rule should not be applied in the case at bar.

We again respectfully submit that both courts below erred in concluding that the doctrine of *Benedict v. Ratner* has no applicability here, and that the rule of the Ohio courts should be disregarded.

The Petition for Certiorari should be granted because of the importance of the legal question involved.

Respectfully submitted,

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August 12, 1943.

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[6] *Freeman v. Rawson*, 5 O. S. 1, 8, quoted in petitioner's brief p. 21.